

N4RHBenc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 GEORGE BENN,

4 Plaintiff,

5 v.

18 Civ. 722 (JLR)

6 THE CITY OF NEW YORK, *et al.*,

7 Conference

8 Defendants.
-----x

9 New York, N.Y.
10 April 27, 2023
10:00 a.m.

11 Before:

12 HON. JENNIFER L. ROCHON,

13 District Judge

14 APPEARANCES

15 ADVOCATES FOR JUSTICE, CA
16 Attorneys for Plaintiff
17 BY: RICHARD SOTO
18 LAINE ARMSTRONG

19 NEW YORK CITY LAW DEPARTMENT
20 Attorneys for Defendants
21 BY: JOHN MICHAEL PESIN
22 ZACHARY KALMBACH

N4RHBenc

1 (Case called)

2 MR. SOTO: Richard Soto, for the plaintiff.

3 THE COURT: Good morning, Mr. Soto.

4 MS. ARMSTRONG: Lain Armstrong for the plaintiff.

5 THE COURT: Good morning, Ms. Armstrong.

6 MS. ARMSTRONG: Good morning.

7 MR. PESIN: Good morning, your Honor. Michael Pesin
8 appearing on behalf of the defendants from the New York City
9 Law Department.

10 MR. KALMBACH: Good morning, your Honor. Zachary
11 Kalmbach on behalf of the defendants from the Law Department.

12 THE COURT: Good morning. Give me one moment.

13 We are here for a final pretrial conference before the
14 trial is to begin shortly. So I know this case is new to me
15 but not new to everyone else. So I'm looking forward to
16 getting it across the finish line for the parties.

17 I have a list of items that I intend to go through for
18 purposes of this final pretrial conference, and then I'm happy
19 to talk about anything else that the parties have for me so
20 that we can be as prepared as possible for the trial.

21 Now, speaking of that, the first item I have is I am
22 going to be adjusting the date of the trial slightly. I need
23 to because I have another trial that's going to run into it.
24 So instead of starting on the Monday, we're going to start on
25 the Wednesday, May 10. And I will tell the jury that we will

N4RHBenc

1 go into early the next week. I don't know that we'll need to,
2 but to give them that same time frame, I'll do that, and we'll
3 talk it about when we get to the voir dire section.

4 But, Mr. Soto and Ms. Armstrong, any issue with that?

5 MR. SOTO: None, your Honor.

6 THE COURT: Thank you.

7 Mr. Pesin and Mr. Kalmbach, any issue?

8 MR. PESIN: None, your Honor.

9 THE COURT: OK. Great. We'll plan on that Wednesday
10 to start the trial. My other trial should be done by then, but
11 if it's done early, we'll just have a break between. I just
12 wanted you to have certainty about when we'll start.

13 In terms of the trial dates, trial schedule, the way I
14 typically do trial is it will start at 9 a.m., the trial day.
15 We will spend from 9:00 to 9:30 together, just the parties and
16 myself, in case there are any issues that we should talk about.
17 Jury will come in at 9:30. We will have a break at lunch —
18 we'll have a midmorning break, then we'll have the lunch break
19 about 12:15 to 1:15, and then we'll have an afternoon break,
20 and the trial day will end at 4 p.m.

21 That gives us five hours of trial time during the day
22 if you exclude the breaks. I will let the jury know that
23 that's our schedule, and we will stick with it so that they can
24 plan their days; meaning, they can plan that they can take some
25 calls during the lunch period or they know they can get home

N4RHBenc

1 and pick up their kids or whatever it is.

2 So we're going to stick to this schedule absent some
3 emergency. What that means also is we're going to use every
4 minute of that time so that we are most effective and efficient
5 before the jury. So if it gets to be, let's say, 3:45 and your
6 witness finishes, you need to have your next witness here, even
7 if it's only for 15 minutes, or else you rest. We're going to
8 fill every minute of time between the 9:30 and 4 p.m. trial day
9 for the jurors. And as I said, I'll have a designated time for
10 breaks and for lunch, so you'll be taking a pause at that point
11 in your witnesses, again, to give people some level of control
12 over their personal lives.

13 Any issues with that trial schedule, Mr. Soto?

14 MR. SOTO: None, your Honor.

15 THE COURT: Thank you.

16 Mr. Pesin?

17 MR. PESIN: No, your Honor.

18 THE COURT: Is it Pesin?

19 MR. PESIN: That's correct.

20 THE COURT: OK. Got it so far.

21 All right. So that's the first issue. The reason I'm
22 holding the trial day that way is because we'll have time, as I
23 mentioned, before trial starts, we'll have time during the
24 breaks, we'll have time during lunch, and we'll time after
25 4 o'clock to talk about any issues that come up during this

N4RHBenc

1 trial. My goal is to make sure that the jury's time is used
2 efficiently. So if you anticipate that there's going to be an
3 issue, some line of questioning that you know your adversary is
4 going to have a problem with, preview it during one of those
5 breaks so we can decide and not have lengthy sidebars, not have
6 lengthy pauses in front of the jury if you know that there's
7 going to be an argument over a particular exhibit, although I
8 don't think there should be now that we have all this pretrial
9 work finished. Again, those times are for us to talk so that
10 we can make sure that the jury's five hours is spent on giving
11 them information and testimony.

12 All right. Let me get to my next issue, which is the
13 motion to quash the subpoena. Let me hear first from
14 plaintiffs regarding the motion to quash, then I'll hear from
15 defendants. And I have some questions, then I'll rule so that
16 you have my ruling now.

17 But before I hear from plaintiff, the return date on
18 the subpoena is tomorrow. Did the defendants receive any
19 documents yet?

20 MR. PESIN: No, your Honor, not yet.

21 THE COURT: Just so I have context.

22 Mr. Soto or Ms. Armstrong, would you like to address
23 your motion?

24 MR. SOTO: Thank you, your Honor.

25 As a first matter, the subpoena should be quashed

N4RHBenc

1 because it's untimely. It's clearly a subpoena for material
2 that should have been sought during the discovery that
3 defendants had ample time to make a motion to reopen discovery
4 and show good cause why the material should have been sought.
5 The defendants argue that this is exclusively a subpoena for
6 impeachment materials and therefore trial exhibits, but the
7 subpoena is not limited to material that would be admissible
8 under Rule -- Federal Rule of Evidence 609. It's broader than
9 that. It asks for the defendants' — for the
10 plaintiff's entire criminal history from Albany. It doesn't
11 limit itself to material that would reflect convictions that
12 carried a sentence of — a possible sentence of one year or
13 punishment by death or convictions for those crimes that deal
14 with the plaintiff's reputation for truthfulness.

15 Secondly, the subpoena itself should be quashed
16 because it's outside the geographical limitation of this
17 courthouse. The office that the materials is being sought from
18 is in Albany, and it's returnable at Corporation Counsel's
19 office on Church Street, and it's seeking certified copies of
20 materials. So it's distinguishable from cases where courts
21 have exercised their discretion to permit subpoenas to stand
22 that seek material over 100 miles outside the courthouse.
23 Those are usually limited to instances where it's seeking
24 electronic information that could be electronically sent to the
25 person serving the subpoena or where some special arrangement

N4RHBenc

1 has been made by the person seeking the subpoena to get the
2 material directly at the point where it would come from.

3 Secondly, we have two further points in our letter
4 that we filed with the Court on April 21 seeking limiting
5 instructions if the Court decides not to quash the subpoena.

6 I think the second point is a bit moot because the
7 defendants have conceded they're only seeking this material for
8 impeachment purposes. Be that as it may, we believe there
9 needs to be a limitation on any materials sought under Rule 609
10 for impeachment purposes. At the least, any material being
11 sought that's older than ten years that reflects convictions
12 older than ten years that fall under the ambit of Rule 609
13 should be excluded because Rule 609 requires that we be given
14 written notice — reasonable notice in written format before
15 informing us exactly what materials older than ten years the
16 defendants seek to use for impeachment purposes, and given the
17 timing of the subpoena, we don't believe that that's going to
18 be possible.

19 We cited one case where the court excluded Rule 609
20 material older than ten years at the point where motions *in*
21 *limine* were being decided because written notice had not been
22 served at that point. And we're approaching a week and a half
23 before trial, and the City doesn't even have the documents yet.

24 In addition to that, we're seeking to have any
25 material that the -- any other material that defendants seek to

N4RHBenc

1 use under Rule 609 for impeachment purposes to be brought
2 before the Court beforehand. So we haven't seen the material
3 so that we can make a proper determination, then, whether we're
4 going to object under Rule 403 for prejudicial purposes.

5 That's all, your Honor.

6 THE COURT: Thank you, Mr. Soto.

7 Mr. Kalmbach or Mr. Pesin.

8 MR. PESIN: Yes, your Honor. Is there any particular
9 area the Court would like us to start with or just --

10 THE COURT: You can address anything. I have a couple
11 of questions.

12 MR. PESIN: Thank you, your Honor.

13 Just to clarify one point, the subpoena that we issued
14 for defendants' criminal history, or rap sheet, is going to be
15 limited to only convictions because it wasn't a subpoena that
16 was attached with a general release. So what we anticipate to
17 receive is a rap sheet that would be redacted so we would only
18 be limited in knowing the convictions that are contained in
19 plaintiff's criminal history.

20 I'll just go chronologically, based on the arguments
21 that plaintiff made. In terms of the timeliness issue, as we
22 indicated in our letter, courts routinely find that trial
23 subpoenas that are limited in scope and limited for purpose,
24 for impeachment purpose, are admissible even -- excuse me, are
25 proper even after the discovery period has closed. And like I

N4RHBenc

1 said before, since this is a subpoena that requests for
2 defendants' prior criminal convictions that will only be
3 limited to convictions and no other personal identifying
4 information, it's properly limited in its scope.

5 THE COURT: You're only seeking to introduce it for
6 impeachment purposes, right?

7 MR. PESIN: For impeachment purposes on
8 cross-examination, correct.

9 THE COURT: And a question on timeliness. So, again,
10 the case is new to me. But I've looked back at the record, and
11 it seems like this case was scheduled to go to trial back in
12 January of 2022, then it was adjourned to April 18, 2022, then
13 adjourned to June 2022, July 2022, then set for January 2023,
14 then it was reassigned to me, and since then we've adjourned it
15 to March 2023, and now we finally have it on May 10, 2023. In
16 all of that time, assuming that service of a trial subpoena
17 even after the close of discovery is appropriate, why are we
18 waiting until now to do this?

19 MR. PESIN: Well, your Honor, in terms of when we
20 submitted the subpoena, it was only recently done, but we did
21 explore through the deposition — through
22 plaintiff's deposition and through interrogatory requests,
23 information about his prior convictions. We don't have an
24 answer to that question. Myself and Mr. Kalmbach only joined
25 this case approximately two weeks ago. It was, obviously,

N4RHBenc

1 during trial preparation, one of the first things we noticed,
2 and obviously, we attempted to rectify that issue as soon as
3 possible.

4 THE COURT: OK. Continue. What about the geographic
5 limitation?

6 MR. PESIN: Yes, your Honor. So in terms of the
7 geographic limitation, I think that when — what that rule
8 intended to protect is to protect witnesses from having to be
9 dragged into trial — the rule was designed to protect
10 witnesses from the burden of travel. The case that we cite
11 stands for the general proposition that when compliance with a
12 subpoena can be accomplished by mail or electronic mail,
13 meaning email, like we anticipate will be accomplished in this
14 case, courts have regularly found that those types of subpoenas
15 are in compliance with Rule 45(c) geographic limitations. When
16 you read that case law together with the understanding that the
17 hundred-mile restriction was really designed to prevent -- to
18 alleviate the undue burden associated with travel in excess of
19 100 miles, I think that there is -- I think that the Court
20 could see that our position is correct.

21 THE COURT: You are assuming you're going to get this
22 information electronically?

23 MR. PESIN: I believe -- it's up to the agency how
24 they want to send it. Ordinarily, they would -- they can do it
25 both ways. Sometimes, depending on who processes it at DCJS,

N4RHBenc

1 it can be just by email or mail. Sometimes we receive it by
2 email and then it will arrive by paper copy as well. But it's
3 up to the agency how to produce those records.

4 THE COURT: Anything else?

5 MR. PESIN: Your Honor, just to clarify, in terms of
6 the timeliness of the request, this is information that we were
7 routinely seeking during the pendency of this case like I
8 mentioned before. It came up during plaintiff's deposition; it
9 came up during other portions of discovery. But in light of
10 how much time has passed, this is just a continuation of
11 getting the most up-to-date records that we're entitled to
12 during the pendency of this case.

13 THE COURT: Thank you, Mr. Pesin. Anything else?

14 MR. PESIN: No, your Honor. I think that satisfies
15 that category. I believe that the issue concerning 609
16 implications or Federal Rule of Evidence 403, I believe that
17 those issues are premature at this point. I think we can all
18 agree that plaintiff's criminal conviction is relevant to his
19 credibility for impeachment purposes, but in terms of any 609
20 implications, I don't believe that plaintiff is -- or I don't
21 believe either party's in a position yet to make 609 arguments
22 since we do not know what's contained in plaintiff's criminal
23 history.

24 I guess, your Honor, if I may, just the very last
25 thing I'll say about that topic is this is information that the

N4RHBenc

1 plaintiffs should already be aware of. So the risk of any
2 prejudice seems little to none.

3 THE COURT: Thank you, Mr. Pesin.

4 That was my question, Mr. Soto, what is the prejudice
5 to this late subpoena, given that it's information that,
6 presumably, your client knows about?

7 MR. SOTO: Well, your Honor, my client doesn't have an
8 exact recollection of exactly what's in his criminal history.
9 He has a layman's understanding of it, but he doesn't have a
10 lawyer's understanding of what might implicate him for
11 prejudicial purposes. And the late timing of this doesn't
12 allow me the opportunity to review those records for any
13 Rule 403 or 609 implications.

14 THE COURT: Thank you, Mr. Soto.

15 OK. I'm going to rule now as follows:

16 Despite defendants' failure to seek the criminal
17 history documents prior to the previous trial dates in this
18 matter, courts in this district do appear to permit limited
19 trial subpoenas where those subpoenas do not seek brand new
20 discovery but rather seek material for cross-examination and
21 impeachment as here. Therefore, I will not quash the subpoenas
22 for the following reasons:

23 First, "Trial subpoenas are appropriate in certain
24 circumstances, such as securing an original document previously
25 disclosed during discovery or for purposes of memory

N4RHBenc

1 recollection or trial preparation." Where a party "intends to
2 use the documents it has requested in these subpoenas for
3 cross-examination and impeachment only, they are properly
4 classified as trial subpoenas." I am citing to the
5 *Agapito v. AHDS Bagel LLC*, case, 2018 3216119, at *1 (S.D.N.Y.
6 May 17, 2018) (internal citations omitted).

7 Here, defendants are seeking criminal history records
8 for plaintiff, specifically, conviction records only, which
9 they contend they plan to use for cross-examination and
10 impeachment purposes only and, in particular, under Rule 609.
11 This type of subpoena is not the kind contemplated in the cases
12 cited by the plaintiff, including the *McKay v. Tri-Borough*
13 *Bridge and Tunnel Authority* case, 2007 WL 3275918, at *2
14 (S.D.N.Y. 2007), and the *Ferrer v. Racette*, 2017 WL 1750377, at
15 *2 (S.D.N.Y. 2017). Both of those cases involve subpoenas that
16 were broad in scope and sought discovery for general purposes,
17 not just impeachment materials.

18 While the trial subpoenas seek only potential
19 impeachment materials, courts -- when the trial subpoena seeks
20 only potential impeachment materials, courts in this circuit
21 have routinely refused to quash the subpoenas as untimely. And
22 the following cases -- I reviewed the following cases and find
23 them persuasive: *Joseph P. Carroll Ltd. v. Baker*,
24 2012 WL 1232957, at *1 (S.D.N.Y. Apr. 12, 2012). In this case,
25 the court found that Baker was seeking documents to be used

N4RHBenc

1 solely for impeachment and rebuttal at the trial and "because
2 the subpoena is a trial subpoena that is limited in scope, the
3 application to quash the subpoena is denied."

4 I also looked at the *Malmberg v. United States* case,
5 2010 WL 186573, at *3 (N.D.N.Y. Mar. 24, 2010). The Gross —
6 I'm sorry, *Goss v. JLG Industries*, 2012 WL 12996214, at *1,
7 (W.D.N.Y. Oct. 22, 2022); and the *Upstate*
8 *Shredding v. Northeast Ferrous*, 2015 WL 12748319, at *4
9 (N.D.N.Y. Feb. 13, 2015.)

10 Because defendants contend this discovery is only for
11 cross-examination and impeachment purposes, as I mentioned, I
12 will not quash the subpoena on the basis that it seeks untimely
13 discovery. Nor do I find that the subpoena is impermissible on
14 geographic limitation grounds. "Federal courts have
15 universally upheld as consistent with the rule this production
16 mode in which the subpoenaed entity at all times acting with
17 100 miles of its office uploads documents for retrieval by
18 counsel for the party who issued the subpoena." And that is
19 from the *Mackey v. IDT Energy* case, 2019 WL 24280, at *4,
20 (S.D.N.Y. May 7, 2019). That is what defendants contend will
21 occur here.

22 Therefore, I am going to deny plaintiff's motion to
23 quash. However, I do ask that defendants provide
24 plaintiff's counsel with copies of whatever they received
25 pursuant to the subpoena as soon as it is obtained. I am not

N4RHBenc

1 ruling at this time as to whether the information may be used
2 at trial for impeachment purposes or otherwise. None of us
3 knows what that material is. I am simply ruling on the motion
4 to quash. Once we get these materials and plaintiff has an
5 opportunity to review them, I will look at any objection as to
6 whether they are, for example, over ten years old for
7 convictions more than -- that are not for more than a year,
8 whether they go to issues of truthfulness or not — all of the
9 evidentiary issues that I will have to look at under Rule 608
10 or 609 as raised by plaintiff, as well as a Rule 403 objection,
11 if there is one made. But I can't do that until I have the
12 documents before me and the parties can assess whether any of
13 those objections are appropriate.

14 So I'm just clarifying right now that because I am
15 granting this motion — because I am denying the motion to
16 quash, this does not mean that the materials will be used at
17 trial for impeachment, which is the only purpose to which they
18 are — defendants intend to use them. And I will hear any
19 objections raised by plaintiff's counsel once we know what
20 those documents are, assuming that you even receive them before
21 trial, which you may not. So we'll see.

22 So that is the motion to quash. Next I wanted to
23 cover just a few other expectations that I have. I understand
24 that the parties did their technology review already. Is that
25 accurate? OK. I'm seeing nodding. That's good.

N4RHBenc

1 So I thank you for that. I don't want to have any
2 glitches with regard to technology. So everyone knows how to
3 use the technology, how to publish items to the jury, etc., so
4 we should be good there.

5 Again, it goes without saying that I don't want any
6 wasted time. I want limited sidebars. Certainly, if we need
7 them, we'll have them. I don't want speaking objections.
8 Certainly, you should object. I'll ask for the ground. You'll
9 tell me what the ground is in a few words or less, and I'll
10 rule. If we need to go to sidebar, we will. But, hopefully,
11 we won't have a lot of that because if there's a very
12 contentious issue we need to talk about, we would have talked
13 about it at one of the breaks and previewed it. I hope
14 everything goes very smoothly as we present the issues.

15 As I mentioned, you need to have your witnesses here
16 and ready to go so that you have no lapse in time. Each of you
17 will have a room outside the courtroom that will be your room.
18 There's two conference rooms on the left. One can be for
19 plaintiffs; one can be for defendants. So your witnesses can
20 sit in there and wait if they need to. You can keep your items
21 there during the pendency of your trial. Sometimes during
22 lunch I will have proceedings that will go on, so you may need
23 to take your items away from the conference tables and put them
24 back there, but those rooms will be yours.

25 I didn't think that I ever needed to say this, but I

N4RHBenc

1 am going to say it based on my history with the prior case. Do
2 not use the jury room — do not go into the jury room. I had
3 parties that went in and decided to have conferences in the
4 jury room during the pending trial. So, again, didn't think I
5 needed to tell the parties that, but stick to the conference
6 room and the courtroom. Do not go into the jury room.

7 All right. Let's move to the — let's see. Let's
8 move to a few of the things to confirm. There is no deposition
9 testimony that's going to be introduced here, and therefore no
10 objections that I need to rule on with respect to deposition
11 designations.

12 Is that right, Mr. Soto?

13 MR. SOTO: Correct, your Honor.

14 THE COURT: And Mr. Pesin?

15 MR. KALMBACH: That's correct, your Honor.

16 THE COURT: Or Mr. Kalmbach, sorry.

17 MR. KALMBACH: Kalmbach, yes.

18 THE COURT: OK. Great. I see that the parties did
19 not submit a joint statement for the jury. Again, that's
20 probably only because you weren't working off of my trial rules
21 at the time; you were working on earlier ones. But, usually, I
22 have the parties submit a statement so that when I'm doing voir
23 dire and I tell the jury briefly what the case is about, they
24 have a bit of background. I'm going to read you the one that I
25 think would be appropriate here, and let me see what you think.

N4RHBenc

1 This case has been brought by George Benn, the
2 plaintiff, against six correction officers: Delroy Morrison,
3 Xavier McNeil, Matthew Landow, Jonathon Powell, Jermain
4 Phillips, and Gordon Noel. Plaintiff alleges on February 19,
5 2015, the defendants violated his constitutional rights by
6 using excessive force against him while he was an inmate at
7 Rikers Island. Each of the defendants deny any wrongdoing and
8 assert that their use of force was reasonable to gain control
9 of plaintiff.

10 Any objection there, Mr. Soto?

11 MR. SOTO: Just one issue, your Honor. We also do
12 have a failure to intervene claim.

13 THE COURT: Yes. Thank you. I will work that in.

14 Mr. Pesin or Mr. Kalmbach, any issue?

15 MR. KALMBACH: I don't believe so, your Honor.

16 THE COURT: All right. So what I will do, just to
17 make absolutely sure there's no issue, is I'll augment it a
18 little bit to reflect the failure to intervene claim, and thank
19 you Mr. Soto. And I'll have my clerk just email that out to
20 you in the next day or so. If there's any issues, you'll let
21 me know. But hopefully it's fine, and that will be the
22 statement that I will use before we do any jury questioning.

23 OK, Mr. Soto?

24 MR. SOTO: Thank you, your Honor.

25 THE COURT: Thank you. So that's on my to-do list.

N4RHBenc

1 All right. I sent around a voir dire questionnaire as
2 Court Exhibit 1 to the parties. I think there are a couple of
3 changes that I think I will need to make to it. The first one
4 is Question 1. I'm going to change it to a trial that is
5 expected to end by mid next week. If we start Wednesday and I
6 tell them mid next week that should be an appropriate time
7 frame. Is that right, Mr. Soto, in terms of your expectations
8 of trial time?

9 MR. SOTO: Yes, your Honor.

10 THE COURT: And Mr. Pesin?

11 MR. PESIN: That's consistent with ours as well.

12 THE COURT: Great. Hopefully, we don't need all that
13 time, but I want them to feel happy about being done earlier
14 rather than angry about being here late.

15 The other thing I think I need to change is Question
16 11. I will put the new counsel's names in here for the Law
17 Department.

18 Mr. Pesin, I had you with two last names, hyphenated
19 last name. How do you prefer to be reflected here?

20 MR. PESIN: Just Michael Pesin works.

21 THE COURT: Will do. I will do that. So I will add
22 those two names to Question 11.

23 Are there any other changes — we'll start with you,
24 Mr. Soto — that I need to make to this jury questionnaire?
25 And let me — just before I ask you that, let me just give you

N4RHBenc

1 a little background about what I did here.

2 I took the questions that the parties proposed. There
3 are many of them, so I tried to take and get a representative
4 sample that I thought could provide a basis for the parties to
5 exercise their peremptory and for-cause challenges. Some of
6 the questions, such as what jurors do in their spare time or
7 some of those other questions, I don't really find relevant or
8 necessary. However, I did include a few of those in the
9 individual questions, Questions 9 and 10, so that you get some
10 sense of that. I'm just not going to go overboard there.

11 I think what I've done is selected enough questions to
12 get sufficient information under the *U.S. v. Nieves* case, which
13 is the more recent voir dire case of the Second Circuit,
14 58 F.4th 623 (2d Cir. 2022). I did include questions regarding
15 relationships with corrections officers, those who've been
16 incarcerated, law enforcement generally, etc., and those are
17 Questions 15, 16, 17, 18, 19, 20. I left out more
18 argumentative ones that had been presented. I don't think
19 those are appropriate, but, again, that was my approach in
20 putting this together.

21 So, Mr. Soto, anything that we need to change with
22 respect to this? Any objection?

23 MR. SOTO: We have no objection, your Honor.

24 THE COURT: Thank you.

25 Mr. Pesin or Mr. Kalmbach?

N4RHBenc

1 MR. KALMBACH: Yes, your Honor, we just have a couple
2 points. For point 12 —

3 THE COURT: Yes.

4 MR. KALMBACH: — we would ask that subsection (b) is
5 changed to the actual name of the facility because Rikers
6 Island actually has a lot of different facilities on it. So it
7 may be confusing to the jury.

8 THE COURT: What is the name of the facility?

9 MR. KALMBACH: The Otis Bantum Correctional Center.
10 We'll refer to it as OBCC in the trial.

11 THE COURT: Can you spell Bantum.

12 MR. KALMBACH: B-a-n-t-u-m.

13 THE COURT: The Otis Bantum what?

14 MR. KALMBACH: Correctional Center.

15 THE COURT: I understand your suggestion. I'm
16 concerned that they may not connect that with Rikers Island.
17 They may not know what the Otis Bantum Correctional Center is.

18 Mr. Soto, do you have a suggestion?

19 MR. SOTO: Well, we share the same concern, your
20 Honor. Maybe we could split the baby and note both terms.

21 THE COURT: What about that, Mr. Kalmbach?

22 MR. KALMBACH: I'm sorry. Could you repeat that?

23 MR. SOTO: Yeah, maybe we could split the baby and
24 note both terms, both Rikers Island and the official name for
25 the facility.

N4RHBenc

1 THE COURT: I would imagine that people would want to
2 elicit if anybody has any familiarity or feelings one way or
3 the other with respect to Rikers Island.

4 MR. KALMBACH: Yes, I think we'd want to avoid — I
5 know that sometimes in the public there's certain connotations
6 with Rikers Island, and I think it would be more prudent just
7 to be as specific as possible because I don't think it's
8 necessarily relevant that it took place on Rikers Island rather
9 than in the facility, the Otis Bantum Correctional Center. So
10 I think, just like for accuracy terms, because during the trial
11 it's going to be referred to as the Otis Bantum Correctional
12 Center, or OBCC, by the defendants in this case and I expect
13 plaintiffs as well, I think it would be -- at least in this
14 question to -- yeah, especially in this question to actually
15 list the Otis Bantum Correctional Center.

16 THE COURT: I don't disagree, and I'm going to list
17 that center. Is that center within Rikers Island?

18 MR. KALMBACH: Yes, your Honor.

19 THE COURT: OK. So then I'm going to leave both of
20 them on there, only because I think it's important that if
21 anybody has any strong feelings one way or the other, that's
22 something that I think may be important for the parties to know
23 with respect to Rikers Island generally, but I will put the
24 other facility in there because that's an item that they will
25 hear about during the trial.

N4RHBenc

1 MR. KALMBACH: Thank you, your Honor.

2 THE COURT: Thank you.

3 OK. Anything else, Mr. Kalmbach?

4 MR. KALMBACH: Yes, your Honor. Referring your Honor
5 to Question No —

6 THE COURT: Yes.

7 MR. KALMBACH: — just for accuracy, where it says "Do
8 you have any feelings or views about the New York City
9 Corrections Department," technically, it's the Department of
10 Correction.

11 THE COURT: Thank you.

12 MR. KALMBACH: Also referring your Honor to question
13 No. 18, we would ask that this question be removed. I think
14 it's inflammatory and also already subsumed by the previous
15 question, Question No. 17, and again Rikers not being just one
16 facility.

17 THE COURT: Mr. Soto, can I hear you on that.

18 MR. SOTO: I believe that's a proper question, your
19 Honor, in that it's not completely reflected in Question
20 No. 17. It gets directly to the point on any feelings any
21 prospective juror might have about that facility in particular.

22 THE COURT: I agree. I'm going to leave that in just
23 in case there is any issue that arises with respect to their
24 feelings about that facility, given that the Otis Bantum
25 Correctional Center is within Rikers Island.

N4RHBenc

1 Mr. Kalmbach, anything else?

2 MR. KALMBACH: One last point, your Honor. Going back
3 to Question 11, and just as a general matter, the introduction
4 of plaintiff's counsel in the papers — in this question, for
5 example, the plaintiff's counsel's firm or affiliated
6 organization is referred to as Advocates of Justice where, I
7 believe, the actual full name is the Advocates for Justice
8 Charter Attorneys, which is in the signature block. So we
9 would just ask that the full firm name be included.

10 THE COURT: Mr. Soto, any objection to putting
11 "Chartered Attorneys" after your name?

12 MR. SOTO: No objection, your Honor. That's our name.

13 THE COURT: All right. I will do that.

14 Anything else, Mr. Kalmbach?

15 MR. KALMBACH: Not as to the voir dire, your Honor.

16 THE COURT: Thank you.

17 All right. So just to give you a sense of process,
18 the way that I do this is I give the questionnaire to all the
19 jurors, including the ones that are sitting in the back of the
20 room, and then we call — well, so we'll have 14 jurors who
21 will be in the box, and there will be more in the back of the
22 room. They will all have the questionnaire. I'll give them a
23 moment to look at the questionnaire, then I will question the
24 first juror with respect to the questionnaire with each
25 question out loud, in case some people hear things better than

N4RHBenc

1 read things, so that they hear it at least once out loud and
2 the record is clear.

3 I will ask those questions of that first juror, and
4 then I'll ask the other jurors whether they have any "yes"
5 answers to Questions 1 through 29, and we'll address any "yes"
6 answers that they have.

7 There are certain questions that I will take the
8 parties -- the individuals over to sidebar to address,
9 including No. 1, which is their availability. I find sometimes
10 that -- that once one juror says I have this event and we start
11 dialoguing about it, another juror has another event. I
12 typically bring jurors over to the side to talk about that.
13 Certainly, if they raise any sensitive issues, I'll bring them
14 over to the side. And then let me tell you the other ones that
15 I intend to bring them over to sidebar for. One moment.

16 All right. I generally would bring people over to
17 sidebar for Question 16 about questions about being
18 incarcerated or something like that, in case anyone is in any
19 discomfort in that regard. Question 17, Question 18, 19, and
20 20, certainly 29 as well. But that's generally how I would
21 proceed.

22 Any objections there, Mr. Soto?

23 MR. SOTO: No objections, your Honor.

24 THE COURT: Mr. Kalmbach?

25 MR. KALMBACH: Thank you, your Honor. I would just

N4RHBenc

1 ask that Question 15 be included in the list you just
2 mentioned.

3 THE COURT: Let me hear from you a little bit more on
4 that. The reason I'm hesitating is that people could have
5 plenty of interactions with the Department of Correction. They
6 could have visited somebody in jail. They could have done all
7 sorts of things that are not particularly sensitive, likely
8 wouldn't taint the jury. So it's not one that I would
9 typically be bringing them to sidebar for. But could you
10 articulate your concern a bit more.

11 MR. KALMBACH: Yes, your Honor. I think part of our
12 concern is that many interactions with the Department of
13 Correction do have to do with being incarcerated, and it's a
14 little different than, like, police department interactions,
15 for example, where there's police officers on the street every
16 day. Interactions with Department of Correction tend to be
17 more specific, more meaningful to certain jurors, can bring up
18 certain feelings or experiences with certain jurors, and I just
19 think that we're concerned that that question in particular
20 implicates some of those concerns and could implicate some of
21 those experiences from the jurors. It also raises the risk
22 that, in response to that question, jurors say something that
23 other jurors can't unhear, other prospective jurors can't
24 unhear.

25 THE COURT: Thank you. That's reasonable. I'll make

N4RHBenc

1 a note there.

2 MR. KALMBACH: Thank you, your Honor.

3 THE COURT: All right. So let's talk about jury
4 selection a little bit. As I said, we'll go through and if
5 there are — the way we'll proceed with jury selection is, as I
6 said, I'll put 14 in the box, and we'll go through voir dire.
7 If somebody is dismissed for cause, I will then put another
8 juror in their spot so that by the end of voir dire of
9 everyone, we will have 14 qualified jurors sitting in the box.

10 Then the way we proceed is each — I'll call each
11 party over to sidebar together, and you can exercise your
12 peremptory challenges. We'll start with plaintiff then
13 defendant, plaintiff then defendant, plaintiff then defendant.
14 You'll each have three. If you don't wish to use one, you
15 don't need to use one, but you'll have the opportunity to use
16 three and to hear the one that has been exercised by your
17 adversary before that.

18 Then assuming you have six independent challenges,
19 we'll go down from 14 to eight, and we'll have eight jurors.
20 That gives us two jurors as a buffer in case someone gets
21 COVID, somebody -- some issue. We'll still have two as a
22 buffer. There are no alternates, as you know, so they'll all
23 deliberate and have to come to a unanimous verdict. But if we
24 lose one because of health reasons, I think we're fine with
25 two. We're not in flu or COVID season really.

N4RHBenc

1 But that's how I intend to proceed. If you don't use
2 all your peremptories, you could end up with nine, but that's
3 my approach.

4 Mr. Soto, any issue with that approach?

5 MR. SOTO: No issue with that approach, your Honor.

6 THE COURT: Thank you.

7 Mr. Pesin or Mr. Kalmbach?

8 MR. PESIN: No, your Honor.

9 THE COURT: So that's how we'll proceed.

10 In terms of COVID, let me just cover the COVID
11 protocols that I will tell the jurors about, which is there are
12 no longer any formal COVID protocols here in the courthouse,
13 but I will inform them that they are welcome to wear masks if
14 they feel more comfortable; they're welcome not to. We have
15 masks if anybody needs them.

16 If anybody tests positive for COVID, they should let
17 us know, and we'll go through the protocols that we need to go
18 through. But we want everyone to feel safe and comfortable
19 here. I have had an issue where somebody has said, for
20 example, that they're particularly susceptible or they have
21 long COVID, and I've allowed them to sit sort of in the back
22 row of the jury box instead of right next to people. So we'll
23 make whatever accommodations we need to make, but generally
24 speaking, we'll try to make sure that everyone feels safe and
25 in whatever way they feel comfortable. But, again, there are

N4RHBenc

1 no strict requirements regarding masks, and we'll proceed in
2 that way.

3 Any objection, Mr. Soto?

4 MR. SOTO: None, your Honor.

5 THE COURT: And Mr. Pesin or Mr. Kalmbach?

6 MR. PESIN: No, your Honor.

7 THE COURT: OK. That's how we'll proceed there.

8 Let's move to the preliminary instructions that I put
9 forth in Court Exhibit 2. These are the general ones that I
10 use for any trial that I have.

11 Any issue with anything in Court Exhibit 2, Mr. Soto?

12 MR. SOTO: We have no issue, your Honor.

13 THE COURT: Thank you.

14 Mr. Pesin or Mr. Kalmbach?

15 MR. KALMBACH: One thing, your Honor. My
16 understanding, we don't intend to use a demonstrative, so I
17 think we could probably take out subsection (c) of Section 3.

18 THE COURT: Yes. And I will repaginate this because
19 it appears to start on page 8. Sorry about that.

20 MR. KALMBACH: Thank you, your Honor.

21 THE COURT: Yes, Mr. Soto, do you intend to have any
22 demonstratives?

23 MR. SOTO: We do not, your Honor.

24 THE COURT: OK. Then I'll take out that instruction.
25 Thank you very much for that.

N4RHBenc

1 Anything else, Mr. Kalmbach?

2 MR. KALMBACH: No, your Honor. Thank you.

3 THE COURT: OK. Great.

4 So I'll use that. I'll also be using, as I said, that
5 joint statement. I'll get the parties' agreement on that
6 before we do.

7 All right. Now let's quickly look at the motions *in*
8 *limine*. The parties already had a conference with Judge
9 Preska, and I just want you to understand that I'm going to
10 adhere, as you would assume, to all of her prior rulings in
11 this case. There were a few things that still seem to be
12 outstanding, so let me touch on them for a bit and see if we
13 need to get more information.

14 The first one is defendants' motions *in limine* No. 4
15 and 7. That motion — and let me just set forth my
16 understanding and my follow-up question. My understanding is
17 that in motion *in limine* 4, defendants move to preclude
18 plaintiff from introducing evidence of defendants' disciplinary
19 histories, prior or current lawsuits, or prior findings of
20 excessive force or false statements, as well as under motion *in*
21 *limine* 7 to preclude plaintiff from referring to unrelated
22 purported instances of police or correction officer misconduct,
23 events at Rikers Island generally, or using terms like
24 "testilying," "BLM," or "blue wall of silence."

25 I understand that plaintiff didn't oppose excluding

N4RHBenc

1 unrelated events and that they weren't intending to do that
2 anyway, but that they still may wish to introduce prior similar
3 complaints for excessive force to show motive and intent. I
4 know defendant has an objection on that, and I understand that
5 the Court held previously that the plaintiff must make a
6 proffer in advance, outside the jury, before introducing any of
7 that, and the Court will then address it.

8 So now that we're on the sort of eve of trial, do we
9 have any of such evidence that's going to be used? At the time
10 of the conference, plaintiff said that he doesn't have any
11 incident in mind, but is there any information that you intend
12 to use in this regard?

13 MR. SOTO: The only information we might use — and
14 this is due to recent research — was there was a 1998 consent
15 decree entered into with CPSU, in particular, about excessive
16 use of force. I need to review that more in detail to see if
17 there's anything relevant which we might introduce there, but
18 that's the only thing I could think of at this point, your
19 Honor.

20 THE COURT: And it's a consent decree from 1998 with
21 whom?

22 MR. SOTO: With CPSU, the unit that Mr. Benn was being
23 held in at Rikers, in particular, regarding complaints about
24 excessive use of force in CPSU.

25 THE COURT: So what I would ask is that you — if

N4RHBenc

1 you're continuing to look at that, that's fine, but I would ask
2 that you — I'm trying to figure out how we're going to decide
3 on any motions in advance of trial. I don't want any pauses,
4 etc.

5 When do you think you'll have a decision on that?

6 MR. SOTO: Hopefully, by middle of next week.

7 THE COURT: OK.

8 MR. KALMBACH: If I may, your Honor?

9 THE COURT: Yes, Mr. Kalmbach.

10 MR. KALMBACH: From the information that
11 plaintiff's counsel just offered about this proposed exhibit or
12 decree, we're going to have all sorts of issues with that, your
13 Honor. It has nothing to do with these officers. There's no
14 *Monell* claim here. It sounds like a policy. It was from the
15 late '90s. This incident took place in 2015. There's no — I
16 don't see any relevance to this whatsoever.

17 So I would just — making that record now, your Honor.
18 It sounds like it's a specific policy that plaintiff's thinking
19 of, so we would, at a minimum, ask that he identify that
20 specific policy. And yes, your Honor, it's irrelevant — it's
21 irrelevant on its face.

22 THE COURT: Thank you, Mr. Kalmbach.

23 So I think what we're going to do, in order to make
24 sure we can move smoothly here, is, Mr. Soto, if you intend to
25 use that, I need you to produce it to defendants and to the

N4RHBenc

1 Court by Monday. And I know that's a little earlier than
2 you're intending, but if you could do that. And we're going to
3 make a running list of what's coming in on Monday, but that
4 will be one of the things that will come in on Monday to give
5 defendants ample time to address it in whatever way they wish
6 to address it, raise whatever objections, etc.

7 So if that information is provided on Monday, then I
8 need any objections to it from the Law Department by Wednesday,
9 and then any reply by Friday. That means I will have
10 everything I need to rule on those objections by the end of
11 next week, which will give me then, I guess, the weekend and
12 early the next week to make a ruling before we start trial.

13 Again, if you don't intend to use it, fine, but you
14 may want to do it just in case so that we have it fleshed out
15 and we're not in the middle of trial with having to go through
16 this back and forth in briefing.

17 All right. So is that a clear schedule for everyone?

18 Mr. Soto?

19 MR. SOTO: Yes, your Honor.

20 THE COURT: OK. Mr. Kalmbach?

21 MR. KALMBACH: Yes, your Honor.

22 THE COURT: All right. You may want to discuss — I
23 mean, the parties seem to be doing very well, I noticed when I
24 was reading the transcript of the proceeding before Judge
25 Preska, in sort of being clear and cooperative, not hiding the

N4RHBenc

1 ball. So if, when you turn this information over, Mr. Soto, to
2 Mr. Kalmbach you can have a discussion, it may be that the
3 parties can reach some sort of agreement or have a clearer
4 understanding about what the disagreement is or whatever it was
5 before you embark on letter writing back and forth. It may
6 help to have a discussion between you both, either to
7 crystallize the issues or to help convince one or the other
8 that your position is right. I hate to have such letter
9 writing if one letter gets written and the other says, OK,
10 you're right. So just maybe try to have a conversation before
11 you start writing letters. That's a suggestion.

12 Motion *in limine* 9, in my understanding, that is
13 defendants seeking to preclude plaintiff from using Department
14 of Correction policies or directives, in large part because the
15 investigation didn't find any violations of those policies. I
16 understand that the Court previously held that plaintiff can
17 ask about the policies as long as they proffer in advance of
18 asking about them outside of the presence of the jury and let
19 the Court know if there's any disagreement.

20 Have the parties had any conversations about this thus
21 far, or is that your understanding as well, Mr. Soto, of how
22 we'd proceed?

23 MR. SOTO: We haven't had a discussion about this
24 particular point, your Honor.

25 THE COURT: Do you still intend to ask those

N4RHBenc

1 questions?

2 MR. SOTO: We don't plan on asking any particular
3 questions on that matter right now, but that is, of course,
4 subject to change.

5 THE COURT: Sure. All right.

6 What I'm telling you now is that if you do intend to
7 go into that area, please preview it and make sure that we have
8 the discussion that was contemplated by Judge Preska, meaning,
9 the proffer in advance before the jury, so that I can make any
10 decisions I need to make. Please do that during one of the
11 breaks or during the lunch and not during a sidebar. So we're
12 not going to, I'm going to ask this question, let's go to
13 sidebar, let's talk about it. Let's handle that as one of the
14 issues that we need to talk about during a break if you do
15 intend to go there in accordance with Judge Preska's ruling.

16 OK, Mr. Soto?

17 MR. SOTO: Yes, your Honor.

18 THE COURT: Thank you.

19 Mr. Kalmbach, does that work for you?

20 MR. KALMBACH: Yes, your Honor. Thank you.

21 THE COURT: OK. Great.

22 Then motion *in limine* 15, defendant sought to preclude
23 plaintiff from testifying or arguing that plaintiff should not
24 have been extracted from his cell. I understand that the Court
25 held that plaintiff can ask about the reason for the

N4RHBenc

1 extraction, and then the Court will entertain a limiting
2 instruction if one is proposed from the defendant.

3 Do you have such an instruction, Mr. Kalmbach or
4 Mr. Pesin?

5 MR. KALMBACH: We don't have a specific instruction
6 right now. We can certainly provide one. But our position —
7 sorry, I'm just reviewing that.

8 THE COURT: Sure. Take your time.

9 MR. KALMBACH: Your Honor, I believe our motion on
10 this point proposed — I'm pulling it up right now — but
11 proposed — jury instruction on this matter. Let me check one
12 more thing. Oh, wait.

13 THE COURT: I think in the --

14 MR. KALMBACH: I may be thinking of --

15 THE COURT: No, I think you're right. I think I saw
16 in the transcript before Judge Preska an instruction that says
17 "The reason for the extraction is not relevant to the issue of
18 whether the force used when the extraction was performed was
19 excessive or not." Is that what you're thinking about at
20 page 30?

21 MR. KALMBACH: I believe that's what I'm thinking
22 about, your Honor. I mean, so on that point, I believe Judge
23 Preska denied our motion for that, our request for that
24 instruction. And I think my understanding is that Judge
25 Preska's concern went to instructing the jury that it was

N4RHBenc

1 lawful, where we would at least want something along the lines
2 of — and I don't know where your Honor would wish to put this
3 — but that the lawfulness of the extraction isn't at issue.

4 Our concern here is that this is going to be kind of a
5 sideshow for the jury. The determination as to whether or not
6 plaintiff — it was proper to remove plaintiff from his cell is
7 not an issue in this trial. I think it will become a trial
8 within a trial, and the jury will — to the extent that the
9 jury buys the argument that the officers should have never been
10 in there in the first place, then it would lead to — high risk
11 of leading to a conclusion that anything that happened in that
12 cell was unlawful on that basis.

13 THE COURT: I hear your argument, but I'm looking at
14 Judge Preska's order. This is her order at ECF No. 193. This
15 is a written order after the conference, and it says: "On
16 motion *in limine* point 15, which seeks to preclude plaintiff
17 from testifying or arguing that defendants should not have
18 extracted plaintiff from his cell, that motion is denied.
19 Counsel may propose a curative instruction."

20 So I think that that's already been ruled upon, and
21 where we are now is whether there is an appropriate instruction
22 that you think should be given. So what I would ask is that
23 you think about if there is such an instruction that you would
24 propose and that would be provided — and I'd like you to
25 discuss that with Mr. Soto and provide the Court with any such

N4RHBenc

1 instruction on Monday. This is on our Monday list. And it
2 should come in the form of a joint letter which provides the
3 instruction, and either that Mr. Soto and Ms. Armstrong agree
4 with it or, if there is any disagreement, their disagreement or
5 their objection will also be included in that letter so that I
6 can rule on that curative instruction.

7 MR. KALMBACH: Thank you, your Honor.

8 One more point on this: I don't have the actual
9 transcript of the last pretrial conference in front of me, but
10 I think our counsel -- or prior defense counsel actually
11 proposed an instruction along the lines of the Court simply
12 saying to the jury the reason for the extraction is not
13 relevant to the issue of whether or not the force was used when
14 the extraction was performed was excessive.

15 THE COURT: Yes, I see that instruction. So that may
16 be the one that you're proposing, and then you'll talk about it
17 with Mr. Soto and Ms. Armstrong and see if that's an acceptable
18 one and just let me know when you're proposing that it would be
19 given. Again, if the parties can agree on that, that would be
20 fine, and that seems to be consistent with what Judge Preska
21 anticipated with the proposal of the curative instruction.

22 So see if there's agreement, and if there's not,
23 you'll reflect that in the May 1 letter -- or the Monday
24 letter.

25 MR. KALMBACH: Understood, your Honor. Thank you.

N4RHBenc

1 THE COURT: Thank you.

2 Then, finally, the last motion *in limine* is motion *in*
3 *limine* 16. Defendants sought to preclude plaintiff from
4 testifying that he sustained injuries to his wrists or ankles.
5 I understand that Judge Preska denied that motion for now and
6 allowed the defendants to take a one-hour deposition. I'm just
7 now asking the parties if that happened and where we are now
8 with respect to that issue.

9 Mr. Soto?

10 MR. SOTO: Your Honor, deposition did take place on
11 that issue on March 8, 2022. I provided the transcript to
12 Corporation Counsel. I don't know what their position is, if
13 they're going to renew that objection, but you should also be
14 aware that Judge Preska had reserved judgment on two of our
15 proposed trial exhibits that were marked in the JPTO as
16 Exhibits 4 and 5 pending -- they were exhibits from New York
17 City Hospitals referencing those very injuries that we wanted
18 to introduce, just like the exhibits we got that pertain to the
19 nose injury. But that deposition was held, your Honor.

20 THE COURT: Can I hear from defendants about your
21 position with respect to that motion.

22 MR. KALMBACH: Yes, your Honor. Our position remains
23 the same. That deposition was held. Plaintiff was very vague
24 as to how that injury occurred, what the exact injury was. So
25 I think, while the deposition was held, it wasn't —

N4RHBenc

1 necessarily cured the issues that we had in the first place, as
2 far as knowing even what these injuries were, what caused the
3 injuries. And I'll note that specific with — specifically as
4 to the medical records that were originally listed in the JPTO
5 as Exhibits — Plaintiff's Exhibits 4 and 5, we would also — I
6 mean, we take issue with both of those exhibits.

7 First of all, the exhibit -- it would be Exhibit 5, is
8 a medical record from July 3 of 2015, several months after this
9 incident, and that medical record appears to refer to an
10 incident that is not related to this case at all. It appears
11 to relate to an incident in which OC spray was used, pepper
12 spray, and that, obviously, did not happen in this incident.
13 So that medical record should not come in and, I think, just
14 goes to show that these injuries — again, there's no evidence
15 that they were tied to this incident at all.

16 And then there's also — which was medical record
17 identified as Plaintiff's Exhibit 4, that does mention — it
18 says "Patient complains of bilateral wrist pain and ankle
19 pain." Just to clarify, that is a medical record from the
20 middle of March, almost a month after the incident, and it does
21 not give any reference at all to the cause of this injury, this
22 purported injury. It doesn't give any indication that the
23 injury was sustained in relation to any incident with
24 Department of Correction officers, certainly not from February.
25 And also note that in the deposition, plaintiff testified that

N4RHBenc

1 the injury to his wrist was specific to his left wrist. The
2 fact that this note says that plaintiff complains of bilateral
3 wrist pain suggests that it may be totally unrelated to this
4 incident.

5 And our concern is just that these medical records
6 were reviewed. Plaintiff saw that he had these ankle injuries,
7 wrist injuries and is now tying them to this incident, where
8 they were never discussed at his original deposition, they were
9 never disclosed in response to interrogatories, they were never
10 disclosed — or they weren't listed in the complaint where a
11 broken nose was specifically listed in the complaint. So I
12 think that pretty much sums up our position on this.

13 THE COURT: OK. Thank you.

14 What I'm going to do, since I haven't seen — since
15 I'd like to see that information more clearly is I'm going to
16 create a bit of a new process, and we're going to talk about
17 it. But now we're going to move our joint letter to Wednesday,
18 and we'll go back and I'll talk about why.

19 In that Wednesday letter, next Wednesday, if you
20 have -- I'd like both parties' position on the motion *in limine*
21 with respect to the injuries to wrists or ankles, including
22 Exhibits 4 and 5. And I'm moving the letter to Wednesday
23 because that gives the parties a chance to talk about this and
24 narrow whatever issues you have. And you'll reflect in this
25 joint letter, Mr. Kalmbach, any motion that remains after your

N4RHBenc

1 discussions, and Mr. Soto or Ms. Armstrong will reflect their
2 position in that letter as well. And then I'll have both
3 parties' position, and I can make a ruling before we start
4 trial.

5 So that will be in the Wednesday letter. In that
6 Wednesday letter, you should also include that curative
7 instruction that we had talked about before. So instead of
8 Monday, that will be Wednesday.

9 And my clerk will remind me if there was something
10 else that the parties are getting back to me so that I can make
11 sure this is as efficient as possible.

12 Right. The consent decree is being turned over on
13 Monday, and therefore, I think -- and the parties should have
14 again a discussion. So instead of having Wednesday and Friday
15 responses, let's just put it in that joint letter for Wednesday
16 so that you'll have it by Monday, and then on Wednesday I'll
17 have the position of defendant and plaintiff with respect to
18 the introduction of that consent decree, and then I can rule in
19 advance.

20 While we're going through the rest of this, my clerk
21 will check and see if there's anything else on the list so that
22 we can be as efficient as possible. But so far we have a
23 Wednesday letter, joint letter, that's going to include several
24 topics.

25 Let's see. Speaking of the exhibits, other than prior

N4RHBenc

1 Exhibits 5 and 4, which I guess you will discuss and determine
2 whether there's any objection to those, and I will rule on
3 those prior to trial. I have an exhibit binder of Exhibits 1
4 through 12 from plaintiff. And then defendants, I understand,
5 only have, essentially, Exhibit 1, which overlaps both parties.
6 And I think that these are a reflection of the rulings that
7 Judge Preska made and that there are no further objections to
8 these exhibits.

9 Is that right, Mr. Soto?

10 MR. SOTO: Yes, your Honor. And just for point of
11 clarity, I could give you a key right now of which exhibits
12 refer to the exhibits that Judge Preska ruled on from the JPTO,
13 if that helps clarify things for you.

14 THE COURT: Well, I'm not sure I need to. I did do
15 that effort, but it looks like the ones that are listed here —
16 I'll ask Mr. Pesin or Mr. Kalmbach, 1 through 12, there's no
17 objections to the new exhibits that we have, 1 through 12, is
18 that correct?

19 MR. KALMBACH: That's not entirely correct, your
20 Honor, because some of those exhibits, or all of them, were
21 listed in the original JPTO, and we did list and note our
22 objections to those exhibits. Some of the objections, for
23 example, to the use of force reports and witness reports are
24 limited to just laying a foundation for relevance, if that
25 makes sense. And to the extent such foundation is laid, then

N4RHBenc

1 we wouldn't object to those exhibits coming in.

2 As far as the medical records, we did assert Rule 403
3 objections to that and to all of the medical records. That
4 objection lies in — there's a few reasons: One, because
5 plaintiff has not listed a competent witness for those medical
6 records to come in. There is highly technical medical jargon
7 in those medical records. I don't think that plaintiff or any
8 other witness that plaintiffs listed is competent to explain to
9 the jury what those mean. And if those are just sent back to
10 the jury, then we're going to have an issue of the jury trying
11 to parse through these medical records and not understand what
12 they mean, have issues with speculating as to what certain
13 terms mean.

14 There's highly technical, like I said, medical jargon,
15 maybe seems more serious than it actually is because there's
16 fancy words. Also, without a competent witness to explain the
17 records, we're deprived of any meaningful cross-examination as
18 to the contents of those records. So that's where our 403
19 objection relies to the medical records.

20 THE COURT: Before you keep going, Mr. Kalmbach, I
21 think you've answered my question, which is I thought Judge
22 Preska had resolved the issues with respect to the exhibits and
23 that I had a full exhibit binder of unobjectionable exhibits, but
24 it doesn't sound like that's the case, and that's fine. I know
25 some were taken out based on her rulings but some remained, and

N4RHBenc

1 it sounds like there are still objections to the ones that
2 remain.

3 So because I want things to move as quickly through
4 trial as possible, let's go through those. But before we do,
5 we might need to take a break. So sounds like we'll have to go
6 through 12 exhibits, and I'll have to give you my rulings. So
7 let me see if there's anything else we need to cover.

8 MR. SOTO: If I may, your Honor?

9 THE COURT: Yes, Mr. Soto.

10 MR. SOTO: I believe Judge Preska ruled on the trial
11 exhibit objections when she ruled on the motions *in limine*, and
12 that's reflected in her order.

13 THE COURT: Yes, that's what I'm going to want to hear
14 from the defendants on. I know that she ruled, for example,
15 that the use of force reports — and I'm happy to hear
16 otherwise — my understanding was that she ruled that those
17 could come in, just not investigative summaries. I assume that
18 the particular officer would be able to authenticate and lay a
19 foundation for each of those.

20 So we'll talk about those in a minute, but it was my
21 understanding that some of these were ruled on, Mr. Soto,
22 you're right. So we'll do that when we go through
23 individually. But before we move to exhibits, again, let me
24 see if there's anything else I need to talk to the parties
25 about.

N4RHBenc

1 There's two other things, so why don't we get those
2 taken care of, then we'll take a short break, and then we'll
3 come back to exhibits.

4 The first thing is the jury instructions. Defendants
5 contend that the evidence won't show that punitives are
6 appropriate to charge here, and we'll deal with it as it comes.
7 But the parties have given me alternate approaches to a
8 punitive damages charge, and I note that each party seems to be
9 covering the same concepts, but there's alternate language
10 that's being proposed. So what would be helpful to me is if
11 either of the parties are working from, say, a standard charge
12 or can annotate theirs, that would be helpful. I assume you
13 took it from a standard charge. One of you may have taken it
14 from a different standard charge. Essentially, can you include
15 in that Wednesday letter the source for your punitive damages
16 charge so that I can evaluate both parties' source and see
17 which is more appropriate.

18 Then in the Wednesday letter, Mr. Kalmbach or
19 Mr. Pesin, can I have some case law or an idea of the case law
20 that you're going to rely on to exclude -- or to not send
21 punitive damages to the jury? It seems that in this case
22 there's an allegation that he was beaten up by officers and his
23 nose was broken, and it seems like a factual issue to me as to
24 whether that was done maliciously or not, etc. But if there
25 are particular cases that you're going to rely on to show that

N4RHBenc

1 punitives should not be charged here, if you could give me a
2 preview of those on Wednesday, that would be helpful so I can
3 start thinking about it in advance. I'm inclined to charge the
4 punitive damages, but maybe you have some wonderful authority
5 that you're going to point out to me that's going to change my
6 mind.

7 And then, finally, Judge Preska ruled on emotional
8 distress damages and ruled that only garden variety emotional
9 distress damages would be available, and I just wanted to
10 confirm that the charge on page 23 of the joint charge is the
11 charge on garden variety emotional distress damages. That
12 paragraph says, "In addition to compensation for physical
13 injuries, you may award reasonable monetary damages for the
14 following: emotional damages such as shame, embarrassment,
15 ridicule, anxiety, injury to reputation, mental anguish,
16 emotional distress, pain and suffering."

17 So I have that, but I just want to make sure that
18 there's not any changes or additional language that needs to be
19 included, given that those instructions were provided before
20 Judge Preska gave her ruling on a limitation to garden variety
21 emotional distress damages. So I'd like in that Wednesday
22 letter if either party has any additional changes or
23 augmentation to the jury charge that has been provided already
24 with respect to garden variety emotional distress damages,
25 given Judge Preska's ruling. I may have all that I need and

N4RHBenc

1 the parties may agree that we're fine, but that ruling came out
2 after the parties presented their proposed jury instructions,
3 and I just want to make sure that the parties don't think that
4 anything needs to change with respect to that charge given that
5 ruling.

6 Then I said finally, but I have one more. I think in
7 the charge, if I'm not mistaken, that plaintiffs have an
8 objection to a standard multiple claims and multiple defendants
9 charge that I typically give in cases like this. That charge
10 says:

11 "Plaintiff alleges claims against each of the six
12 defendants. You must be careful to impose any damages you may
13 award on a claim solely on the defendant or defendants who you
14 find to be liable on that claim. Although there are six
15 defendants in this case, it does not follow that if one is
16 liable, the others are liable as well. Each defendant is
17 entitled to a fair, separate, and individual consideration of
18 the case without regard to your decision as to the other
19 defendant. If you find that only one defendant is responsible
20 for a particular injury, then you must impose damages for that
21 injury only upon that defendant.

22 "Nevertheless, you might find that more than one
23 defendant is liable for a particular injury. If two or more
24 persons unite in an intentional act that violates another
25 person's rights, then those persons are jointly liable for the

N4RHBenc

1 acts of each of them. The law does not require the injured
2 party to establish what portion of a charge was caused by
3 defendant that you find liable for that injury."

4 Mr. Soto or Ms. Armstrong, can you help articulate
5 your objection to that just so I can consider it as I'm putting
6 together the jury charges? Maybe you don't have an objection
7 to that.

8 MR. SOTO: I don't think we have an objection to that
9 at this point, your Honor.

10 THE COURT: OK. That's what I thought. Thank you.

11 All right. Let's, before we break, talk about
12 witnesses really briefly. I have your witness list.

13 Mr. Soto, do you still plan to call Sandra Murray?

14 MR. SOTO: At this point not, your Honor.

15 THE COURT: OK.

16 MR. SOTO: We'll probably just have the seven
17 witnesses, the named defendants and Mr. Benn, testify.

18 THE COURT: So you're going to call defense witnesses
19 on your case?

20 MR. SOTO: Yes, your Honor.

21 THE COURT: And you understand, Mr. Kalmbach and
22 Mr. Pesin, we're not going to call witnesses again, right? So
23 you'll be doing your examination at the same time following the
24 examination by Mr. Soto. Is that clear?

25 MR. PESIN: Yes, your Honor.

N4RHBenc

1 THE COURT: Great. So given that, let's just get a
2 little timing so that I can understand how this is going to
3 flow.

4 Mr. Soto, how long do you anticipate Mr. Benn will be
5 on the stand?

6 MR. SOTO: For direct examination, probably an hour or
7 two. One to two hours.

8 THE COURT: One to two hours.

9 And for cross, Mr. Pesin?

10 MR. PESIN: Approximately one hour.

11 THE COURT: And Mr. Morrison, for your examination,
12 Mr. Soto?

13 MR. SOTO: Depending on how hostile the witness is, I
14 mean, it could take anywhere from 45 minutes to two hours.

15 THE COURT: We'll put one to two hours there.

16 And your examination, Mr. Pesin?

17 MR. PESIN: Again, depends how much territory
18 Mr. Soto's able to cover, but I would put it at approximately
19 one hour as well, but that could be -- that could be a lot less
20 depending what areas are covered on direct examination — on
21 plaintiff's examination, excuse me.

22 THE COURT: So for my planning purposes, then, if we
23 did an hour and a half for both — an hour and a half for
24 plaintiff, hour and a half for defendant, would that be an
25 approximate time frame for each of the police officers,

N4RHBenc

1 Mr. Soto, or corrections officers?

2 MR. SOTO: I think so, your Honor.

3 THE COURT: Mr. Pesin, do you agree?

4 MR. PESIN: I would, yes.

5 THE COURT: OK. That takes care of that.

6 So I'll use that to sketch out the time a little bit
7 just to make sure that we're going to finish up by that mid
8 next week promise that I'm going to make to the jury. I think
9 we will, based on what you're showing me here. So that seems
10 fine.

11 We're also going to be playing the video, I presume,
12 Mr. Soto?

13 MR. SOTO: Yes, your Honor. I plan on reviewing that
14 video with each of the witnesses, and that video is
15 approximately 20 minutes long. For some of the witnesses, I
16 don't think we'll be reviewing the entirety of the video, but
17 the City may have different opinions on how much of it they're
18 going to run through.

19 THE COURT: Thank you. So that will be included in
20 your one and a half hours.

21 About how long do you think your openings will be?
22 And I know you haven't prepared them yet, but typically, what
23 do you think, Mr. Soto or Ms. Armstrong?

24 MR. SOTO: Half-hour to an hour.

25 THE COURT: OK. And Mr. Pesin or Mr. Kalmbach?

N4RHBenc

1 MR. KALMBACH: Your Honor, it will be well under half
2 an hour. I don't see it taking longer than 15 minutes.

3 THE COURT: All right. So that helps me sketch
4 through the trial a little bit in terms of timing. I think we
5 should be fine there.

6 Why don't we take a five-minute break, come back at
7 11:30, and we'll go through the exhibits. Thank you all.

8 Court is adjourned for five minutes. Thank you to the
9 court reporter. Let's come back at 11:35.

10 (Recess)

11 THE COURT: Broke my first rule. It's 11:38 instead
12 of 11:35. Sorry about that. Let me follow up on a couple of
13 items.

14 First, I looked at -- again, I did rough math with my
15 clerk on timing. With the times that you've provided with an
16 hour and a half for each officer, I think we're not going to
17 end in time. So I think you may have chosen that number
18 because I suggested it, and I don't know that you're going to
19 need three hours with each police officer to go over the same
20 incident, but allocate your time appropriately.

21 I would just say that you should plan to try to get
22 this to the jury by Monday, latest Tuesday, to meet the
23 expectation. The parties said this was a three- to five-day
24 trial, so I think that's reasonable so that we have time to
25 then charge and get them deliberating and all those things. So

N4RHBenc

1 think about that as you're doing your examinations. Again, we
2 have five hours of trial testimony a day, and that excludes the
3 breaks. So we can revisit, but I don't want to make a promise
4 to the jury that I can't keep.

5 So, Mr. Soto, will that work?

6 MR. SOTO: That works, your Honor.

7 THE COURT: Thank you.

8 Mr. Pesin or Mr. Kalmbach?

9 MR. PESIN: Yes, your Honor, of course.

10 THE COURT: Again, think about that as we're
11 progressing through the witnesses, but with that time period in
12 mind, getting the case to the jury by Monday, latest Tuesday,
13 and then they'll have time to deliberate.

14 The other thing is I don't have exhibits, prior
15 Exhibits 4 and 5. I think the parties only sent me the new
16 exhibit binder, so if you could just submit those.

17 MR. SOTO: I have copies right now.

18 THE COURT: I'll take them now. I was going to say
19 you could submit them with your Wednesday letter, but I'll take
20 them now.

21 MR. SOTO: May I approach, your Honor?

22 THE COURT: Yes, please.

23 And we'll hear from the parties on any objections in
24 that Wednesday letter.

25 So we're going to go through two more items. One is

N4RHBenc

1 the exhibit list, and then I want to go through the verdict
2 sheet very briefly with the parties so we can iron things out
3 there. So let's look at the exhibit list that we have, and
4 we'll tick through things in an orderly fashion.

5 Exhibit 1 is the video of the incident. Both parties
6 are suggesting it. I assume no objection there, Mr. Soto?

7 MR. SOTO: No objection, your Honor.

8 THE COURT: And Mr. Kalmbach or Mr. Pesin?

9 MR. PESIN: No objection.

10 THE COURT: So that one comes in.

11 The Exhibit 2 and 3 are medical appointment notes, and
12 I believe I heard defendants' objections with respect to those.
13 It is compelling to me that under a hearsay objection, even if
14 they are a business record, you'd still need somebody who's
15 going to be able to lay a foundation for these records. And I
16 will note that a couple of cases, the *Duchnowski v. County of*
17 *Nassau*, 416 F.Supp.3d 179, 183 (E.D.N.Y. 2018), that held that
18 neither plaintiffs nor the police officer defendants can
19 establish that medical records are what they appear to be or
20 that they conform to the requirements of either 803(4) or
21 803(6). I'm also looking at the case called
22 *Djangmah v. Falcione*, 2013 WL 6388364, at *6 (S.D.N.Y. Dec. 5,
23 2013), which states that plaintiff could not lay the foundation
24 with testimony from himself, several members of his family, or
25 two eyewitnesses on the scene.

N4RHBenc

1 So, Mr. Soto or Ms. Armstrong, how do you intend to
2 introduce the medical records?

3 MR. SOTO: As a first matter, your Honor, I would just
4 note it's our position for all these objections on the
5 remaining trial exhibits that these objections — the City was
6 given the opportunity to raise those objections by Judge Preska
7 and to press them, and they did not, and they therefore waive
8 them. I would point the Court to the transcript of the
9 proceedings that were held to review the motion *in limine* and
10 other document objections starting at 51:8, line 8, and then
11 going on for the next several pages. The Court gave the City
12 ample opportunity to argue each of these objections, and the
13 objections are pretty much the same for all the remaining
14 documents.

15 We voluntarily withdrew one of the exhibits that the
16 plaintiffs objected to, which was marked at the time as
17 proposed Exhibit 3 in the JPTO, and they pressed their
18 arguments on Exhibits 4 and 5, which Judge Preska reserved on.
19 And then Judge Preska specifically addressed in her *in limine*
20 order also trial exhibit objections. She noted which trial
21 exhibits have been thrown out. And we would argue from that,
22 *expressio unius est exclusio alterius* in that since none of the
23 other documents that the City did not press their objections on
24 at that time are mentioned, that they're in.

25 That's our position. I mean, any further development

N4RHBenc

1 on that I would -- I mean, I didn't prepare to address those
2 specific arguments for today, your Honor, because I thought
3 those exhibits were already in.

4 THE COURT: Thank you.

5 I will admit that I too thought that the exhibit
6 issues were resolved. For example, I saw on page 17 of the
7 transcript Judge Preska excluded the investigation or findings
8 of the investigation, but, and I quote, "The proper documents
9 would be the use of force reports which, as counsel has pointed
10 out, the individual defendants filled out themselves." So I
11 thought that — I too, looking briefly — and I could look more
12 closely if I need to — thought that the exhibit objections
13 were already resolved in the conference before Judge Preska.
14 And I'm looking at also her order, document 193, where she
15 talks about her rulings with respect to Exhibits 3, 7, 9, and
16 then reserving on 4 and 5, which is why I thought I was
17 receiving a full copy of exhibits to which all objections had
18 been resolved.

19 Mr. Kalmbach or Mr. Pesin, can you direct me somewhere
20 else?

21 MR. KALMBACH: Thank you, your Honor.

22 I just want to be clear, our objections to these
23 exhibits are how they're coming into evidence to make sure
24 there's a foundation laid for relevance. In the last pretrial
25 conference transcript, the Court asked Mr. Arko, the prior

N4RHBenc

1 attorney on this case, are there any serious objections to the
2 documents that are proffered? Our interpretation of that is
3 that we weren't waiving, necessarily, our simple — not
4 authenticity, foundational objections to those exhibits. That
5 was to talk about more serious objections as to, like, the
6 actual substance of certain documents, things of that nature.

7 Here, our objections to these are just foundational
8 for relevance; for example, the use of force reports, the
9 defendant officers can lay the foundation for those. So I
10 don't know that I would necessarily refer to that as, like, a
11 serious objection insofar as we're just wanting to make sure —
12 I don't think that anywhere we waived objections to exhibits
13 because it is still important, right, that every exhibit is
14 entered through a witness; they're not just thrown to the jury.
15 And being entered through a witness, the witness has to be able
16 to lay the foundation. And for documents such as use of force
17 reports that are written by the witnesses, they can lay that
18 foundation, and we're not going to have a problem with that.

19 THE COURT: I see. So your objections are only to
20 relevance and laying a foundation. So the police reports,
21 let's say Exhibits 4 through 12, which are all the reports
22 prepared by the police officers, as long as the police officers
23 can authenticate them and say, yes, this is my report, then
24 your position would be that they then come in. Is that right,
25 Mr. Kalmbach?

N4RHBenc

1 MR. KALMBACH: Yes, your Honor. Through the officer
2 that wrote the actual report.

3 THE COURT: Sure.

4 Mr. Soto, do you have any issue with that?

5 MR. SOTO: None, your Honor.

6 THE COURT: OK. So then that makes it easier. And I
7 agree with you, exhibits shouldn't just be thrown in to a jury;
8 they should be introduced in some sort of logical way.

9 So 4 through 12, that takes care of.

10 Then with respect to the medical appointment notes, 2
11 and 3, then, obviously, since they would be relevant to his
12 injuries that he had, you're suggesting that if Mr. Benn then
13 introduces and says what they are, then they would come in
14 because they would be authenticated that way, Mr. Kalmbach?

15 MR. KALMBACH: Your Honor, our position on this is I
16 don't believe that plaintiff is qualified to lay the foundation
17 for relevance for those records because they don't just note
18 plaintiff has a knee — a broken nose or something like that.
19 They're filled with medical jargon and medical terms that are
20 going to be going to the jury, and the jury's going to see
21 these entire documents. And it's important that they're able
22 to understand every piece of evidence that's going to them,
23 which is every sentence, every word in that document, and I
24 don't believe that plaintiff is able to himself lay the
25 foundation for such documents. And I would refer to the cases

N4RHBenc

1 that your Honor listed that police officers and laypeople
2 aren't qualified to make those — or to lay that foundation.

3 THE COURT: What's your response to the — I mean, you
4 saw the witness list — not you, the Law Department saw the
5 witness list prior to the conference before Judge Preska, and
6 if there was — I would consider this a serious objection to
7 medical records coming in because they can't meet the
8 exceptions to hearsay without having an appropriate foundation.
9 That could have been raised before Judge Preska. That doesn't
10 seem like a relevance objection. It seems like a significant
11 objection to which she requested the parties to raise, and it
12 was not raised. Again, the witness list has not changed. So
13 there was nobody on plaintiff's witness list that would fit the
14 category that you're describing here today.

15 What's your response to that?

16 MR. KALMBACH: Could I just have one moment to confer
17 with counsel?

18 THE COURT: Absolutely. Take your time.

19 MR. KALMBACH: Thank you, your Honor.

20 (Counsel confer)

21 MR. KALMBACH: We're ready, your Honor.

22 THE COURT: One moment before you do that.

23 Mr. Soto, can you give me that page again from the
24 transcript where Judge Preska talked about any serious
25 objections to exhibits.

N4RHBenc

1 MR. SOTO: You want the citation, or do you want the
2 actual transcript?

3 THE COURT: I have the transcript. Just give me the
4 page.

5 MR. SOTO: It's page 51. And I believe the discussion
6 started at 51, line 7, and then we went on for several pages
7 discussing document objections.

8 THE COURT: OK. Thank you very much.

9 Mr. Kalmbach.

10 MR. KALMBACH: Thank you, your Honor.

11 At this point, as far as why this wasn't raised
12 before, I don't want to speak on behalf of Mr. Arko. I will
13 say that I apologize that it wasn't raised before. The issue
14 still stands about what should and should not go to the jury.

15 I would just ask for, if your Honor's amenable to it,
16 giving us some time to confer with plaintiff's counsel about
17 possible redactions, about other issues, and if there's any
18 issues as to those that we cannot resolve, then we can put it
19 in the Wednesday letter as well.

20 THE COURT: I think that's fair.

21 Mr. Soto, would you be amenable to having some
22 discussions about this? Because we perhaps can resolve if
23 there's an issue with an unrelated report or something that's
24 not relevant to your case.

25 MR. SOTO: I'd be amenable to that discussion, your

N4RHBenc

Honor. One thing I would just like to raise. Oftentimes when something goes to trial and we're wrangling over the exhibit list, a lot of times these basic objections are on authenticity and authentication, and they get waived because you don't want to go through the rigmarole of subpoenaing a doctor to come in to authenticate the document. I had assumed those issues had been waived just based on the kind of discussion we had in front of Judge Preska. If I had known this was a serious objection and this was going to be an issue, I would have altered the witness list, and I would have subpoenaed each of these documents to come in, an authenticated document that we have no reason to believe is going to be inauthentic and certainly isn't irrelevant. They corroborate — they corroborate Mr. Benn's testimony about the injuries he sustained on that day.

So if the issue is simply a hearsay objection and authentication, we would have subpoenaed the doctors to come in and give ten minutes of testimony to authenticate the documents.

THE COURT: Thank you.

Mr. Kalmbach.

MR. KALMBACH: Thank you, your Honor.

I just want to be clear. This isn't an authenticity objection. The records are certified. It's a foundational question about what and what should not go to the jury as far

N4RHBenc

1 as laying a foundation, relevance. There — as
2 plaintiff's counsel just mentioned, hearsay, there's some
3 hearsay within hearsay issues in there as far as certain
4 statements.

5 As far as plaintiff's counsel's reference to
6 subpoenaing doctors, I think that whether or not we raise these
7 objections earlier, that's something — amending a witness list
8 is something that we would have opposed, depending on — I'll
9 have to go back and look at plaintiff's Rule 26 disclosures.
10 Because if a doctor wasn't identified or any witness that could
11 explain these, then maybe, regardless of timing, amending the
12 witness list wouldn't have been proper.

13 But I think a discussion with plaintiff's counsel on
14 this will be productive. And putting it in the Wednesday
15 letter, I think, is the best way to go.

16 THE COURT: Why don't you do that. Know that in your
17 discussions, I will look back at the record, but it was, as I
18 stated earlier, my understanding that all objections with
19 respect to exhibits had been resolved, if there were any,
20 especially significant ones, such as something like this,
21 before Judge Preska, and the opportunity was there to have that
22 conversation before Judge Preska.

23 So that argument, I am sympathetic to that argument.
24 I have not ruled exclusively yet, but I ask you to take that
25 into consideration when you have those discussions with

N4RHBenc

1 Mr. Soto about what comes in.

2 I do have one question. Exhibit 2, which are medical
3 records, it has on there a date — an altercation date on 2/20.
4 I'm looking at the first page of the exhibit: "Patient reports
5 altercation on 2/20 and injury to his face." I'm assuming this
6 is the same injury. It may just be a typo with respect to 2/19
7 or 2/20.

8 But there's not a different injury or a different
9 incident that happened on 2/20 that year, is there, Mr. Soto?

10 MR. SOTO: That's my understanding, your Honor.

11 THE COURT: OK. That's what I thought as well.

12 Mr. Kalmbach, any reason to believe there's another
13 incident that occurred then?

14 MR. KALMBACH: At this point I don't have any reason
15 to believe that there was another incident on 2/20.

16 THE COURT: Great. Thank you.

17 Again, maybe my layperson's reading of that is
18 incorrect, but I just wanted to have a little information
19 there.

20 All right. So the parties will talk about those
21 medical records. Again, I am sympathetic to if there was any
22 issue here, it could have been raised earlier; plaintiff could
23 have gotten the appropriate witness. And I do see on the
24 transcript that the Court invites any remaining document
25 objections — and that's on page 51 of the transcript at docket

N4RHBenc

1 No. 197, page 51, line 8 — and then various document
2 objections are handled by her. So keep that in mind as you
3 guys are discussing those documents.

4 All right. Finally, let's look at the verdict form.
5 I'm going to have my clerk give you a copy of one that I've
6 mocked up just to discuss with the parties. I got,
7 essentially, sort of two verdict forms from the parties. So I
8 did my best to put them together in a way that seems to make
9 sense. I'm not going to ask you — well, I will ask you what
10 you think of them, but certainly you're not — let's see.

11 So one of the items I'd like the parties to talk about
12 real quickly is — and I've included punitive damages here just
13 because we then all can look at it; we can decide whether it
14 gets charged or not. But then we have compensatory damages
15 here, and I have them combined in Question 3 on page 3, as was
16 suggested by plaintiff, "Has plaintiff proved that he's
17 entitled to compensatory damages for excessive force and/or
18 failure to intervene," and then an amount here, and then
19 nominal damages if not an amount.

20 This is slightly different than what was suggested by
21 the City, but this is what plaintiff proposed, and I didn't see
22 an issue with it.

23 Mr. Kalmbach or Mr. Pesin, is there any issue with
24 proceeding this way?

25 MR. KALMBACH: No objection, your Honor.

N4RHBenc

1 THE COURT: All right. That just helped me. I'm just
2 trying to get as much done as possible before we start the
3 trial so that everything moves as smoothly as possible.

4 And I thank the parties. I have to put this on the
5 record as well. I've had several cases like this in the past,
6 and the parties were giving me what ostensibly seemed to be
7 joint filings, and they weren't really joint filings. These
8 are truly joint filings. I appreciate that. You've noted your
9 limited objections. It looks like you attempted to resolve any
10 disagreements and come to, in large part, consensual proposals
11 to me with your objections clearly noted so that I could rule
12 on them. So I thank you for that. The jury instructions and
13 the verdict form were very clear in that regard. So thank you,
14 Mr. Soto.

15 MR. SOTO: Just one point I'd like to add. I just
16 noticed, just on all the questions, it appears Corrections
17 Officer Phillips has been left off.

18 THE COURT: Well, that is a significant change. So,
19 yes, of course. Thank you. What I'll do is I'll leave this
20 with you, and thank you for that correction. If there are any
21 other main corrections, let me know in the Wednesday letter.

22 But the main difference I saw between the parties'
23 proposed verdict sheets were that combination on compensatory
24 damages and then the question about whether punitives are
25 charged or not. We can deal with whether they get charged or

N4RHBenc

1 not, but I just put them here as to how they would get charged
2 if they were charged.

3 OK. I think that that is all that I have on my list,
4 and my binder's now come apart, so it has to be all that I have
5 on my list.

6 Is there anything else, Mr. Soto, that we should
7 discuss today?

8 MR. SOTO: Nothing from plaintiff, your Honor.

9 THE COURT: Thank you.

10 Anything, Mr. Pesin or Mr. Kalmbach?

11 MR. PESIN: Nothing further, your Honor.

12 THE COURT: All right. Well, I hope that this gives
13 the parties enough information to prepare for trial.

14 You have something else, Mr. Pesin?

15 MR. PESIN: I'm so sorry, your Honor.

16 THE COURT: No, take your time.

17 MR. PESIN: Just a moment ago I spoke with Mr. Soto
18 about possibly nailing down an order of witnesses list. Is
19 that something that the Court is amenable to do?

20 THE COURT: Are the defendants all going to be here
21 because they're all on trial as defendants, or do they plan to
22 only show up for portions of the trial?

23 MR. PESIN: So all defendants are available. Two of
24 them need to have — need to travel from out of state. So the
25 reason we ask is because we will need to give them lodging

N4RHBenc

1 accommodations and figure out flights and some things of that
2 nature. So depending on — we've already adjusted the trial
3 schedule by a couple of days, which is fine, but it would be
4 helpful for travel accommodations and scheduling purposes if we
5 could figure that out.

6 THE COURT: Seems reasonable.

7 Mr. Soto, any issue with that?

8 MR. SOTO: Well, the only -- we're still consulting on
9 the strategic consideration of when exactly to call Captain
10 Morrison.

11 THE COURT: OK.

12 MR. SOTO: I believe he's one of the two that needs
13 accommodation on flying in. I could probably provide a list by
14 tomorrow of everybody else in the order that we're going to
15 call them in, but we still haven't decided when exactly we're
16 going to call Captain Morrison. And I would just ask a little
17 leeway while we review and prep with our client on when we can
18 make that determination.

19 THE COURT: Mr. Pesin, is that what you need, or did
20 you need more than that?

21 MR. PESIN: No, that should work, your Honor.

22 THE COURT: Great. You'll collaborate there.

23 I don't want to interfere with any party's strategic
24 determinations, but I do also think that it's helpful for
25 everyone to help the trial move smoothly that the parties know

N4RHBenc

1 and expect when the different witnesses are coming on. So
2 please do try to have those discussions so that we can
3 facilitate that.

4 If there is -- and I'm going to check my instructions
5 that I have now to make sure that I have one regarding order of
6 witnesses in terms of instructing the jury that some witnesses
7 may be called, for example, on plaintiff's case who are
8 defendants' witnesses, or something like that. I think I have
9 something on that, just to make sure everyone's clear. But
10 otherwise, as I mentioned, they'll only be called once on the
11 case.

12 All right. Mr. Pesin or Kalmbach, anything else?

13 MR. PESIN: No, your Honor. Thank you.

14 THE COURT: No problem.

15 As I was saying before, my goal in having this lengthy
16 conference and resolving all these issues is to make the trial
17 proceed smoothly through. If there is another issue that I
18 have not covered, please raise it for me as soon as possible.
19 We will have, as I said, those breaks before, during, and after
20 each trial day so that we can do that. You'll have this
21 Wednesday letter where you can submit, if there is anything
22 that we haven't covered, although you have plenty of things to
23 put in that Wednesday letter anyway. But a goal here is
24 preparation and an understanding as to how things will proceed
25 at trial so everyone can do their best work and put on their

N4RHBenc

1 best cases.

2 Well, I will see you all, then, on May 10 to start
3 trial. Let's say right now that the parties will come at 8:30
4 on that day instead of 9:00, because it sounds like I will have
5 to rule on some of the items if there is anything to rule on
6 from the Wednesday letter, and that will give us a good hour
7 for me to give you my rulings on that before we start.

8 I'll look at the list that's provided. I don't think
9 any of them were things that you needed rulings on any earlier
10 than the morning of trial, but I'll look at it and see. Again,
11 I wanted everyone to have an understanding of what's coming in
12 and out as much as possible before trial begins, but I think
13 most of them can wait until that morning of.

14 Thank you again to the court reporter for her time.

15 Thank you, everyone. I look forward to trying this
16 case with you, and Court is adjourned.

17 (Adjourned)

18

19

20

21

22

23

24

25